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DISCLOSURE OF EVIDENCE BEFORE TRIAL: THE DEVELOPMENT OF THE RULES OF COURT AND THE TRANSFORMATION OF POLICY

This article examines the developments in the process of discovery in civil cases in the course of this decade and assesses changes in policy concerning the disclosure of evidence before trial. Singapore's position in this area of procedure is compared to that operating in other common law legal systems.

I. INTRODUCTION

THE scope of discovery under the Rules of the Supreme Court, 1970[1] and the previous Rules of the Supreme Court[2] and Civil Procedure Codes[3] has been considered by the author in an earlier article.[4] The following account analyses the subsequent developments which have brought the discovery process to its current position, examines its modern significance and compares it to discovery procedures operating in other countries.

The common law system of litigation, which was traditionally characterised by the primacy of oral evidence and its adduction from witnesses at trial, made little allowance for its production beforehand. Save for very specific circumstances, a party was not entitled to discover the oral evidence which his opponent would produce at trial. Although the rules governing discovery of documentary evidence were more generous than those pertaining to oral evidence, discovery prior to the close of pleadings was not available except in limited and specific instances, and only then between parties. With regard to interrogatories, the requirement of leave and the restrictions imposed by the courts on the use of the process rendered it an unpopular procedure. Furthermore, there was considerable doubt as to whether the courts could order any form of discovery beyond the scope of the rules in the face of apparent limits imposed by statute. The policy of these rules assumed that

1 S 274/70. To be referred to as "RSC, 1970".
2 *Ie*, the RSC, 1934 (S 2941/1934). To be referred to as "RSC, 1934".
3 Ordinance No 31 of 1907 and Ordinance No 102 of 1926, respectively.
4 "The Early Development of the Discovery Process" [1997] SJLS 396.

the dispute would be determined at trial, being the appropriate time for the evidence to be produced by the parties. It was recognised that the parties should have some information concerning each other's cases in the interest of clarification of the issues, to avoid the expense of obtaining the evidence by some other means; and to prevent the delay which would inevitably result from a less efficient means of securing evidence. However, the conventional wisdom was that containment of information rather than broad revelation was the key to the efficacy of the adversarial system. Successive developments in the 1990s show a transformation of the traditional policy of discovery in a re-orientated approach to litigation.

II. Affidavit of the Evidence in Chief

The introduction of pre-trial disclosure and use of affidavits at trial in lieu of the traditional mode of examining witnesses in chief is the most significant development in the trial process in modern times. The former rule, as stated in Order 38, rule 1 (RSC, 1970) was that the evidence of witnesses had to be proved "by the examination of witnesses orally". Affidavits could be used at the trial but only if the court regarded the circumstances to be such that "it would be reasonable to so order".[5] This process envisaged the use of affidavit evidence as an exception to the general rule that witnesses were to be *orally* examined. The effect of the amendments is that the use of affidavit evidence is no longer the exception but rather the general method for adducing the evidence in chief of the witness. The current Order 38, rule 2(1) provides:

> ...unless otherwise provided by any written law or by these rules, at the trial of an action commenced by writ, evidence in chief of a witness shall be given by way of affidavit and, unless the court otherwise orders or the parties to the action otherwise agree, such a witness shall attend trial for cross-examination and in default of his attendance, his affidavit shall not be received in evidence except with the leave of the court.

This new procedure does not alter the mode of trial which continues to be the examination of witnesses in open court.[6] Indeed, Order 38, rule 1 of the Rules of Court, 1996[7] is only amended to the extent that the word "orally" is deleted. However, where, as in the majority of cases, the evidence

5 O 38, r 2(1) (RSC).
6 O 38, r 1 (RC).
7 To be referred to as "RC".

in chief is in the form of affidavits, the examination of witnesses will generally be limited to cross-examination and re-examination. Accordingly the witnesses who give their evidence in chief by way of affidavit are expressly required to attend trial for the purpose of cross-examination "unless the court otherwise orders or the parties to the action otherwise agree".[8] With regard to suits begun by originating summons, originating motion or petition and applications by summons or motion, the previous position was that the affidavit process was not obligatory unless the rules otherwise provided or the court otherwise directed. The amended provision states that evidence in these matters "shall" be given by affidavit. As in the case of a writ action the witness is to be available for cross-examination unless the court otherwise orders or the parties otherwise agree.[9]

The mandatory nature of the new process is underlined by Order 38, rule 2(3) (RC) which provides that, unless the court otherwise orders, the deponent to an affidavit may not give evidence in chief at the trial or hearing of any cause or matter the substance of which is not contained in that affidavit, unless the evidence concerns matters which have arisen after the filing of the affidavit. This is an important qualification as evidence may arise during the post-affidavit stage of proceedings. The rule gives the court the discretion to allow a witness to give his evidence in chief orally in court even if it concerns matters which arose before the filing of the affidavit. However, this discretion is only likely to be exercised in exceptional circumstances; otherwise the general rule would be eroded.

In certain circumstances the affidavit process may not have to be utilised at all. Order 38, rule 2(4) provides that the court "may, if it thinks just, order that the evidence of a party or any witness or any part of such evidence be given orally at the trial or hearing of any cause or matter". Therefore, there is a clear recognition that the general rule cannot be a rigid one, and that there may be circumstances in which examination in chief at the trial would be the appropriate mode of adducing evidence. This is one of a number of important matters which must be raised at the summons for directions stage of the proceedings.[10]

In England, a similar procedure involving the pre-trial disclosure of witnesses' statements and their use at trial as evidence in chief was introduced in 1986 in the form of Order 38, rule 2A. The following appraisal was given of the new procedure:

8 O 38, r 2(1) (RC).
9 O 38, r 2(2) (RC).
10 See O 25, r 3 (RC).

> It embodies a fundamental innovation in the law and practice relating to the identity of the intended trial witnesses of the parties and relating to the confidentiality of their statements or 'proofs' of evidence. It provides a radical alteration to the manner of elucidating the evidence in chief of witnesses at the trial by their oral examination in open Court.... Above all it greatly improves the pre-trial process by providing the machinery for enabling all the parties to know before the trial precisely what facts are intended to be proved at the trial, and by whom, and thereby it reduces delay, costs and the opportunity for procedural technicalities and obstruction towards the trial.[11]

When the procedure was introduced in Singapore in 1991, there were a number of significant differences in approach between the two jurisdictions. First, the English rules were, and continue to be, concerned with the disclosure of *statements*, not affidavits. Secondly, the process in England, until recently, was a matter for the court's discretion to be exercised if it thought "fit for the purpose of disposing fairly and expeditiously of the cause or matter and saving costs".[12] In Singapore, the procedure was mandatory from the outset. Thirdly, a recent English practice direction provides that witness statements are to stand as the evidence in chief.[13] This has always been the requirement in Singapore.[14]

The process of adducing a witness's evidence in chief by way of affidavit is set in motion at the summons for directions stage. The court is specifically directed to consider what orders and directions it should make in relation to the case. They may relate to such matters as the period within which the parties have to file and to exchange affidavits of the evidence in chief, the number of witnesses, how evidence is to be disclosed where an affidavit cannot be obtained, and how expert evidence is to be disclosed and adduced.[15] There are also specific provisions governing automatic directions in personal injury cases.[16]

[11] *Supreme Court Practice* (1995), vol 1, paragraph 38/2A/2. Also see *Supreme Court Practice* (1997), vol 1, paragraph 38/2A/2.

[12] See now O 38, r 2A(2) of the English RSC, which requires the court to make the order for exchange.

[13] *Practice Direction (Civil Litigation: Case Management)* (24th January, 1995) [1995] 1 WLR 262.

[14] Other differences between the procedures in Singapore and England are examined in the following article by the author: "Adducing Evidence by Affidavits and Witness Statements: A Comparison of the Singapore and English Processes" (1993) 12 CJQ 92.

[15] See O 25, r 3(a)-(j) (RC).

[16] See O 25, r 8(a)-(j) (RC).

Strict rules govern the content of the witness's affidavit. The information must be relevant and not contravene the exclusionary rules of evidence. It is specifically provided that the affidavit is not to contain evidence which, if given orally, would be inadmissible.[17] If the affidavit fails to comply with these requirements the other parties may object within the period fixed by the court at the summons for directions stage.[18] If a party fails to comply with the court's directions for the filing and exchange of affidavits the other party may apply by summons at any time after the default for an order to enter judgment or dismiss the action. He may also apply for such other order as to costs or otherwise as is just in the circumstances.[19]

The affidavit takes its usual form which is governed by Order 41. It must indicate the title of the action, the deponent's name, address and occupation. The deponent is required to express himself in the first person. The affidavit is to be organized consecutively in numbered paragraphs, "each paragraph being as far as possible confined to a distinct portion of the subject". Numbers, sums and dates are to be stated in figures and not in words. The deponent must sign the affidavit and the jurat (the closing part of the affidavit) must be in the prescribed form.[20] The affidavit may still be used as evidence in the case notwithstanding any "irregularity in form" if the court's leave is obtained.[21] Specific rules govern the alteration of exhibits.[22] A practice direction supplements Order 41. It was introduced "with a view to standardising the form of affidavits and exhibits which are filed for use in any proceedings in the Supreme Court."[23] The practice direction concerns such matters as the general form of the affidavit, its markings (details such as the party on whose behalf the affidavit is filed, the name of the deponent, the number of the affidavit in relation to the deponent, and the date of filing must be stated in the top right hand corner), the binding of the affidavit, its pagination and the use of exhibits.[24]

There are obvious advantages to the new process of adducing the evidence of witnesses before trial. It should expedite proceedings and enable the parties

17 See O 38, r 2(5) (RC).

18 See O 25, r 3(1)(h) (RC) and prayer 22 of Form 46 (RC), which provides that the objections are to be taken within one month of the exchange of affidavits.

19 See O 25, r 3(2) (RC).

20 See O 41, r 1. See Form 78 (RC).

21 O 41, r 4.

22 See O 41, r 7.

23 See the preamble to Practice Direction No 7 of 1991, which appears in Pt IV of the *Supreme Court Practice Directions* (1997) and the *Subordinate Courts Practice Directions* (1997).

24 *Ibid*.

to know more precisely what they are up against. This is likely to encourage settlement. If the matter goes to trial the parties will be able to prepare and present their cases more effectively. However, the new procedure will not always be appropriate and the court can exercise its discretion to order that evidence be given by some other mode if this is just in the circumstances of the case. An important question is whether the court will only allow an alternative mode of giving evidence when the party faces practical difficulties, such as the unwillingness of a witness to depose to his evidence, or his appearance very late in the proceedings so that the affidavit process is no longer viable. Or will the court also consider the nature of the witness's evidence in relation to the case? In *Mercer* v *Chief Constable of Lancashire*[25] the English Court of Appeal thought that the most significant factor in determining whether or not the witness's statement should stand as the evidence in chief was "the extent to which the evidence... is likely to be controversial and his credibility in issue. If so, the way he responds to oral examination in chief may be of great importance".[26] Although this consideration can be fully appreciated, it does raise problems. As the evidence of most witnesses is in issue, the court will have to decide the extent of controversy required before it exercises its discretion. If the parties hope to examine their witnesses in chief they are likely to expend considerable energy in persuading the court why it should exercise its discretion in their favour. It may then become necessary to make distinctions between witnesses for this purpose, a practice which may become superficial and lead to inconsistency in the absence of clear guidelines. An additional obstacle is that the court may have considerable difficulty in assessing a witness's credibility before the trial unless this is apparent from the nature of the case or the court is aware of the particular facts concerning this issue. Demeanour can often have a significant bearing on the weight of the evidence. However, it cannot be assumed that it will always be obvious to the court from examination in chief that a witness is lying or mistaken. Indeed, a well-coached witness can often mislead the court. The new procedure does allow for more effective cross-examination by reason of the pre-trial disclosure of evidence. Accordingly, the significance of the witness's demeanour is enhanced at this stage of the proceedings.

The rules may have to be further refined to cater to difficulties which may arise from the process. A party might decide not to call a witness despite having filed and served an affidavit of that witness's evidence in chief. He might come to this decision before the trial or during the trial.

[25] [1991] 1 WLR 367.
[26] *Ibid*, at 371.

For example, having cross-examined an opposing witness he may decide that it is not necessary or desirable for his own witness's affidavit to stand as the evidence.[27] He can rely on the general rule which provides that the affidavit is not to be received in evidence unless the witness is present for cross-examination. The exceptions to this rule are that the parties may agree to its admission in evidence, or the court may give leave for this purpose.[28] Unless one of these exceptions apply the witness's affidavit, which was filed and served on the basis that it would constitute evidence, can be withdrawn by the party as a tactical manoeuvre. If the opposing party had relied on that affidavit for the purpose of his case, and had intended to introduce evidence in respect of that affidavit, he may no longer be able to do so, as the matter has been taken out of contention. Such a practice can cause uncertainty as the parties cannot be sure that the evidence disclosed in the form of affidavits will be the evidence relied on at the trial. Nor is it clear how the judge would exercise his discretion to receive an affidavit where the witness is not present for cross-examination. Furthermore, once the affidavit is filed it enters the public domain as a court document containing evidence pertaining to the case. It should not be withdrawn at the whim of a party. Another question which arises is whether the court will allow a party to file and serve a supplemental affidavit to include evidence left out of the initial affidavit, or to take issue with matters raised in the affidavit filed by the opposing party. Although no provision is made for supplemental affidavits, there is no reason why the court should not permit a party to file a supplemental affidavit in suitable circumstances.[29] The rules do allow the witness to give part or all of his evidence orally at the hearing with the court's leave.[30] In the recent defamation case of *Lee Kuan Yew & Ors* v *John Vinocur & Ors*,[31] the High Court ruled that as the plaintiffs merely wanted to amplify the evidence in their affidavits on the issue of malice and hurt to their feelings, such oral evidence would not contravene the general rule restricting the evidence at trial to the scope of the affidavit.[32] Accordingly,

[27] He might come to this conclusion in a variety of circumstances. For example, if the cross-examination has been effective he may not need to call a rebuttal witness. On the other hand, if the cross-examination reveals to the cross-examining party that his own witness lacks credibility he may not want to call that witness as he would be exposed to cross-examination.

[28] See O 38, r 2(1) (RC).

[29] In English procedure, witness statements may be supplemented. See para 38/2A/10 of the *Supreme Court Practice* (1997), vol 1, paragraph 38/2A/2.

[30] See O 38, r 2(4) (RC).

[31] [1995] 3 SLR 477.

[32] See O 38, r 2(3).

the plaintiffs were allowed to testify.[33] The court concluded that this decision would not conflict with the policy considerations behind the pre-trial disclosure of affidavit evidence; namely, the expeditious disposal of proceedings, the saving of costs and the elimination of surprise. It remains to be seen whether this decision will be limited to defamation suits involving similar issues. There may well be other circumstances in which amplification by a claimant (or even a non-claimant witness) of his affidavit evidence is justified.[34] However, there must be some limitation here if such licence is not to proliferate into a general practice which would offend the policy consideration of expeditiousness in the disposal of proceedings.

III. Discovery of Documents before the Commencement of the Action and Against Non-parties

Apart from the introduction of the process of adducing evidence in chief by affidavit, the most far-reaching changes in respect of general discovery are to be found in the new rule 7A of Order 24 (RC), and Order 26A (RC). They extend documentary discovery and discovery by interrogatories respectively to the stage before the commencement of the action and to non-parties after the commencement of the action. The former section 18(2)(m) of the Supreme Court of Judicature Act[35] (SCJA) merely empowered the court to order discovery in the manner prescribed by the rules. Order 24 (RSC) only contemplated discovery in a pending action between the parties. Even rule 7 of that Order, which enables a party to apply for early discovery, is confined to discovery between parties in a pending action.[36]

The changes introduced by the Supreme Court of Judicature (Amendment) Act 1993 and the rules passed pursuant thereto[37] mean that the "mere witness" rule[38] no longer holds sway in Singapore. Paragraph 12 of the first schedule

[33] Pursuant to O 38, r 2(4) and O 92, r 4 (RC).

[34] For example, a claim for emotional harm may require oral evidence to express the intensity of the claimant's reaction to the defendant's wrongful act.

[35] Cap 322.

[36] See O 24, r 2 (RC), which operates after the close of pleadings, and rr 3 and 7 which provide for discovery against a "party" to the proceedings. Also see *Abraham* v *Law Society of Singapore* [1991] 3 MLJ 359, in which Rajendran J accepted the submission of counsel that discovery under O 24 (RSC) could only apply if there was a pending cause or matter. For an historical account of these provisions, see the author's earlier article, "The Early Development of the Discovery Process", *supra*, note 4.

[37] *Ie*, the RSC (Amendment No 2) Rules 1993 (S 278/93) and Subordinate Courts (Amendment No 2) Rules 1993 (S 279/93).

[38] For an account of this rule, see the author's earlier article, "The Early Development of the Discovery Process", *supra*, note 4.

to the SCJA, as amended, provides that the court has: "power before or after any proceedings are commenced to order discovery of facts or documents by any party to the proceedings or by any other person in such manner as may be prescribed by the rules of court". The applicable rules are contained in Order 24, rule 7A, which governs discovery of documents; and Order 26A, which concerns interrogatories.

Order 24, rule 7A substantially adopts the equivalent provision operating in England. However, it is significantly broader than the English rule which only applies in suits for personal injury.[39] The Singapore rule 7A applies generally to any action if certain conditions are fulfilled. These conditions differ according to the type of discovery involved: discovery prior to the commencement of proceedings[40] and after the commencement of proceedings against a non-party.[41] The new rule offers obvious advantages. The availability of material documents prior to the commencement of an action enables the potential plaintiff to assess the merits of his claim before he decides to incur the financial burden and other sacrifices involved in pursuing legal proceedings. The courts will gain additional working time as the number of weak claims should be reduced. Furthermore, by reason of early disclosure of the evidence the potential plaintiff is placed in a position which allows him to consider the prospect of settlement before he commences proceedings and incurs costs. Similarly, discovery against a non-party in respect of a material document after the commencement of the action may have the effect of resolving the dispute. Rule 7A should go some way towards redressing the unfortunate situation in which settlement is only considered after automatic mutual discovery, which is often the first occasion on which the parties disclose their documentary evidence.

A few words on the procedure governing rule 7A are necessary. Where discovery is sought before the commencement of the action the application must be made by originating summons, and the person against whom the order is sought must be made a defendant to the summons.[42] In the case of discovery after the commencement of the action, the application is made by summons "which must be served on that person personally and on every party to the proceedings".[43] In either case, the summons must be supported

[39] The English rule is also O 24, r 7A. It was passed pursuant to ss 33(2) and 34(1) and (2) of the Supreme Court Act 1981.

[40] O 24, r 7A(1) (RC).

[41] O 24, r 7A(2) (RC).

[42] O 24, r 7A(1) (RC).

[43] O 24, r 7A(2) (RC). According to the English practice, the summons states the sub-rule (*ie*, rr 7A(1) or 7A(2)) pursuant to which the application is brought, and the documents in respect of which the order is sought. See the *Supreme Court Practice* (1997), vol 1, paras 24/7A/3 and 24/7A/4.

by an affidavit which must conform to the requirements laid down in rule 7A(3).[44] If the application is made prior to the commencement of proceedings, the affidavit must state: "...the grounds for the application, the material facts pertaining to the intended proceedings, and whether the person against whom the order is sought is likely to be party to subsequent proceedings."[45]

Certain requirements are common to both types of application.[46] Thus it is provided that whether the application is made prior to the commencement of proceedings, or after the commencement of proceedings against a non-party, the affidavit must: "...specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power."[47] The applicant must give sufficient information to show that the documents are relevant to an issue arising, or likely to arise out of the claim made, or likely to be made, in the proceedings.[48] The provisions concerning inspection of documents referred to in pleadings and affidavits,[49] and orders for production of documents for inspection,[50] are extended to applications for discovery pursuant to rule 7A.[51]

The principle on which the discretion must be exercised is the same as that applicable to Order 24, rules 3 and 7, and is expressed by Order 24, rule 8 in the following manner: "On the hearing of an application for an order under rule 3, 7 or 7A,[52] the court, if satisfied that discovery is

[44] Also see O 24, r 7A(4) (RC).

[45] O 24, r 7A(3)(a) (RC).

[46] Note that in *Kuah Kok Kim* v *Ernst & Young* [1997] 1 SLR 169, at para 26, the Court of Appeal ruled, on the basis of a purposive interpretation, that paragraphs (a) and (b) of rule 7(A)(3) (which were connected by the word "or") had to be construed conjunctively and not disjunctively. These effect was subsequently achieved by the removal of the word "or" by the Rules of Court (Amendment No 2) Rules, 1997 (S 283/97). Therefore, an application under r 7A must satisfy both paragraphs (a) and (b) of rule 7A(3).

[47] O 24, r 7A(3)(b) (RC). To ensure compliance, the court may require the person against whom the order is made to make an affidavit stating whether "...any documents specified or described in the order, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them": r 7A(5).

[48] See *Shaw* v *Vauxhall Ltd* [1974] 2 All ER 1185.

[49] See O 24, r 10 (RC).

[50] See O 24, r 11 (RC).

[51] See O 24, r 7A(7) (RC).

[52] The rule was amended to extend the principle to the new discovery rules (O 24, r 7A (RC)).

not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."[53] It will be argued that as an application pursuant to rule 7A involves concerns not normally pertinent to rule 3 and rule 7 situations – in particular, the position of a non-party – the basis for discretion in rule 8 may have to be considered in the appropriate context.

The pre-action discovery requirement that the affidavit state whether the person against whom the order is sought is "likely to be party to subsequent proceedings" is not entirely free of difficulty. "Likely" is not as precise a test as one would wish. Furthermore, the circumstances at the stage of the application may make it very difficult to make any determination as to likelihood. The English Court of Appeal sought to come to grips with this issue in *Dunning* v *Board of Governors of the United Liverpool Hospitals*,[54] a case which involved a claim in respect of improper medical treatment in hospital. Prior to the commencement of any proceedings the patient applied for disclosure by the hospital of records concerning her treatment. The hospital refused. The majority of the Court of Appeal held that the order to disclose the documents had been properly made and dismissed the appeal.[55] Denning LJ came to the view that the hospital was likely to be a party in future proceedings. His Lordship stated that if the documents contained information pointing to negligence on the part of the hospital, "then a claim is likely to be made; but if not, then a claim is not likely". His Lordship added: "...I think that we should construe 'likely to be made' as meaning 'may' or 'may well be made' dependent on the outcome of the discovery. One of the objects of the section[56] is to enable a plaintiff to find out – before he starts proceedings – whether he has a good cause of action or not. This object would be defeated if he had to show – in advance – that he had already got a good cause of action before he saw the documents."[57] James LJ, who agreed with Denning LJ that discovery was justified, construed "likely" as meaning "a reasonable prospect".[58]

[53] For illustrations of the operation of the principle, see *Shaw* v *Vauxhall Ltd*, *supra*, note 48; *Barret* v *Ministry of Defence, Times*, 24 January, 1990; *O'Sullivan* v *Herdmans Ltd* [1987] 1 WLR 1047.

[54] [1973] 2 All ER 454.

[55] Stamp LJ dissented.

[56] *Ie*, s 31 of the Administration of Justice Act 1970. This was the governing provision at the time of the case. See now s 33(2) of the Supreme Court Act 1981.

[57] [1973] 2 All ER 454, at 457.

[58] *Ibid*, at 460. The case was approved shortly afterwards in *Shaw* v *Vauxhall Ltd*, *supra*, note 48.

The principles in *Dunning* were applied by the Singapore High Court in *Mandraki Holdings Inc* v *Agrosin Pte Ltd*,[59] the first case on the new rule.[60] The plaintiff was already involved in a suit against *N* for various remedies including money due under an assignment of earnings executed by *N* in favour of the plaintiff as security for a loan. The assignment extended to freight and charter hire earned in the course of *N*'s shipping business. The plaintiff learned that *N* had chartered a vessel to *Agrosin* for the purpose of carriage of cargo between various ports. The plaintiff served a notice of the assignment on *Agrosin* so as to cover freight and charter hire earnings due from *Agrosin* to *N* under their charterparty. *Agrosin*'s refusal to pay led to an application for disclosure of various shipping documents (relating to the voyages under the charter) from *Agrosin* under Order 24, rule 7A. The High Court concluded that if the documents confirmed that the vessel had indeed been chartered to *Agrosin*, then it was likely that *Agrosin* would be joined by the plaintiff as a defendant in the suit against *N*. Accordingly, discovery under rule 7A was permissible.

More recently, in *Kuah Kok Kim* v *Ernst & Young*,[61] the Court of Appeal considered the rules in some detail. The appellants were the minority shareholders in a company, who agreed to sell their shares to the majority shareholders at a price to be valued. The respondents were appointed to provide a non-speaking valuation and they valued the shares at $2.15 per share. The appellants then sold the shares at that price to the majority shareholders. The appellants subsequently obtained a valuation from another accounting firm which valued the shares between $3.17 and $3.26 per share and also provided a brief statement of the various methods of valuation which they had used and the methods which they considered inappropriate. The appellants requested the respondents to disclose their valuation but the respondents refused, stating that they had agreed to a non-speaking valuation.

The appellants then commenced proceedings against the respondents for pre-action discovery (pursuant to rule 7A) of documents and working papers which they had referred to or used in determining their valuation. The purpose of the application was to enable the appellants to decide whether an action lay against the respondents for breach of contract or negligence. The assistant registrar granted the application and ordered the respondents to give discovery of "the documents or working papers relied upon, referred to or used by them for the purpose of the valuation of the shares" of the company. The trial judge allowed the appeal in part and varied the order to exclude

[59] OS No 858 of 1994. Judgment dated 12th January, 1995.
[60] Even so, the case was not officially reported.
[61] [1997] 1 SLR 169.

working papers and documents created or prepared by the respondents. Having decided that paragraphs (a) and (b) of Order 24, rule 7A (3) had to be read conjunctively, the Court of Appeal went on to determine whether the appellants had complied sufficiently with the procedure as set out in rule 7A(3).

Lai Kew Chai J, who delivered the judgment of the court, accepted the views expressed in *Dunning* v *Board of Governors of the United Liverpool Hospitals*[62] and *Shaw* v *Vauxhall*:[63]

> It can be seen from the tenor of the cases that where pre-action discovery is sought, the plaintiff has a duty to set out the substance of his claim to enable a potential defendant to know what the essence of the complaint against him is. This is because in the nature of pre-action discovery, the plaintiff does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer. Thus the safeguards specified in the rules are to ensure that the plaintiff is not allowed to take advantage of the rules merely to enable him to go on a fishing expedition.[64]

Hence "the court is not precluded from making an order if the only basis for saying that a claim was not likely was the absence of the documents of which discovery was sought."[65] His Honour explained:

> The reason for the introduction of such a procedure...was essentially to encourage quick settlement of disputes by early and full disclosure of relevant documents. On the facts, the appellants were able to establish some grounds for seeking pre-action discovery as there was some evidence to show that they may have a cause of action and that the documents were likely to be relevant to an issue pertaining to the cause of action.[66]

With regard to the affidavit requirements, the learned judge said:

> Although the affidavit should state the cause of action, it is not necessary to give particulars of it, even though it may be desirable. Indeed the rule does not state that particulars of the cause of action must be given.

62 *Supra*, note 54.
63 *Supra*, note 48.
64 *Kuah Kok Kim* v *Ernst & Young*, *supra*, note 61, at para 31 and from para 38.
65 *Ibid*, para 39.
66 *Ibid*, at para 40.

> We do not agree ... that 'material facts' under rule 7A(3)(a) means all the facts sufficient to constitute the elements of the cause of action. If the material facts had to be as precise as those normally pleaded in any cause of action, and if the appellants were in a position to depose to an affidavit to this effect, they could well be in a position to commence proceedings immediately. It would not be necessary to provide a scheme for discovery before action. To be so precise would impose too onerous a burden on the appellants. We are of the opinion that as long as the appellants stated the facts sufficiently to explain why pre-action discovery was necessary, this was adequate.[67]

The appellants did not specify the actual documents which they sought in the affidavit. Instead they used the following generic definition: "the working papers and documents employed by the defendants in arriving at the said valuation, in order to ascertain the basis of the valuation". The court ruled that this was sufficient compliance with the rule:

> As long as the appellants described the type or class of documents with reasonable precision, and that class of documents were relevant to the cause or intended cause of action, that would be enough. They need not go on to describe and name each and every such document specifically. Indeed, it would be unreasonable and impossible for the appellants to do so.[68]

The Court of Appeal disagreed with the decision of the High Court to exclude working papers and documents created or prepared by the respondents, expressing the view that all the documents sought "were relevant to an issue likely to arise out of the claim which was likely to be made in the intended proceedings; and that they were necessary for disposing fairly of the cause or matter".[69]

Whether a person is "likely" to become a party in the action may be difficult to determine where it appears that he may be able to successfully rely on a defence. Would the applicant bother commencing proceedings in these circumstances? In *Harris* v *Newcastle Health Authority*,[70] the Court of Appeal had to consider whether a potential defendant, who had a very strong prospect of succeeding on the basis of a limitation defence, was likely

[67] *Ibid*, at paras 34-35.
[68] *Ibid*, at para 37.
[69] *Ie*, the wording of O 24, r 7(A)(3)(b) and r 8 (which declares the discretion of the court).
[70] [1989] 2 All ER 273.

to be a party to the proceedings. The court held that disclosure could be ordered as it was not absolutely certain that the limitation defence would succeed, and furthermore, the court did not have before it all the materials which might be relevant to the issue of limitation, and which would enable it to make a determination on the matter. The documents discovered might raise facts which could affect the limitation defence. The case would seem to indicate that the defence must be clearly established in order for the defendant to challenge the application on the ground that he is not "likely" to become a party in the action. It is not yet clear to what extent the court will take on the task of sifting through available evidence for the purpose of making this determination.

Another difficulty concerns the scope of the pre-action discovery rule. Can it be used to obtain discovery from someone whom the applicant does not intend to make a party to the action? For example, a *Norwich Pharmacal* situation in which a person is required to disclose information concerning the potential defendant so that the applicant may proceed against the latter.[71] In English law, the operation of pre-action discovery is limited by statute to persons who are likely to be parties to the proceedings.[72] As no such restriction is imposed by paragraph 12 of the First Schedule to the SCJA or by the rules it is arguable that the Singapore court has greater flexibility in the matter. Furthermore, in England, as the *Norwich Pharmacal* order may be granted as part of the court's common law jurisdiction it is not necessary for this form of discovery to be covered by the rules. In Singapore, statute provides that discovery must be in accordance with the rules of court.[73] The pre-action discovery rule requires the affidavit to state, *inter alia*, "...whether the person against whom the order is sought is likely to be party to subsequent proceedings...."[74] It could be argued that in the absence of express prohibition in statute and the rules, this requirement of the affidavit merely enables the court to consider all the appropriate circumstances in deciding the application, and that the likelihood of the person being made a party is not a mandatory requirement. Different priorities may apply depending on whether the application is made against a person likely to be a party and a person who will not be involved in the proceedings. The broad interpretation of the rule may have lost some force as a result of the case of *Mandraki Holdings Inc* v *Agrosin Pte Ltd*.[75] The English position

[71] For an account of this principle, see the author's earlier article, "The Early Development of the Discovery Process", *supra*, note 4.

[72] See s 33(2) of the Supreme Court Act 1981 (England).

[73] Para 12 of the First Schedule of the SCJA.

[74] O 24, r 7A(3)(a) (RC).

[75] *Supra*, note 59.

was followed, and discovery was allowed under rule 7A on the basis of the likelihood of *Agrosin* being made a party. Nevertheless, the point is still open to argument as the court did not definitively state that this condition was essential to its decision.

Even assuming that the broad interpretation is acceptable, the requirement that the discovery must relate to "an issue arising or likely to arise out of the claim made or likely to be made in the proceedings"[76] indicates that the *Norwich Pharmacal* order is not contemplated. This order is often sought to ascertain the identity of the wrongdoer, a matter which is not necessarily related to the issues in the action. Furthermore, whereas the principle which governs an order under the pre-action discovery rule is "necessity",[77] the *Norwich Pharmacal* order involves the additional element that the person concerned has "facilitated" the wrong. These last two points reveal that the provisions are not specifically geared to the *Norwich Pharmacal* order.

Finally, it is necessary to consider the position of the respondent to the application for discovery under rule 7A. The rule permits discovery against non-parties. This raises the fundamental question of the extent to which, if any, a non-party who may have no interest in the proceedings, should be interfered with for the sake of the litigants. Put another way, are the interests of the parties to a suit any greater than the right of the ordinary citizen to enjoy privacy? We have already examined the principle upon which the court is to exercise its discretion in respect of rule 7A. Order 24, rule 8 (RC) provides that discovery must be necessary at the stage of the proceedings when the application is made, either for disposing fairly of the cause or matter or for saving costs. As we have seen, rule 8, which originally governed the discretion to be exercised in respect of rules 3 and 7, was extended to rule 7A. It is clear from the wording of rule 8 that it is solely concerned with the issues in the suit and, therefore, necessarily limited to discovery between the parties – the concern of rules 3 and 7. However, rule 7A involves additional considerations. There is more at stake in a rule 7A application than the interest of the parties to the suit. There is the interest of the individual not to be disturbed on account of a private dispute which does not concern him. The fact that he is entitled to rely on legally established privileges[78] does not quite resolve the problem. The

[76] O 24, r 7A(3)(b) (RC).

[77] O 24, r 8 read with O 24, r 7A (RC).

[78] In the case of an application for discovery before the commencement of proceedings, the person is put in the same position as if the proceedings had commenced; and, in the case of discovery against a non-party after the commencement of proceedings, he is regarded as being in the same position as a witness who has been served with a *subpoena duces tecum*. See r 7A(6)(a) and (b). Also see *Campbell* v *Tameside Metropolitan Borough Council*

operation of privilege only means that the respondent need not disclose particular documents, nor answer specific questions. He remains obliged (whether or not he intends to challenge the application) to be involved in the process by which the application for discovery is considered. Moreover, the privileges available are limited[79] and, therefore, do not preserve his rights in respect of all confidences.[80] Rule 7A provides that in the case of discovery against a non-party after the commencement of proceedings, he is regarded as being in the same position as a witness who has been served with a *subpoena duces tecum*.[81] There are cases which establish that the court has a duty to ensure that a non-party witness at trial is not forced to divulge evidence which would infringe his privacy, or which would otherwise be oppressive. For example, in *Morgan* v *Morgan*,[82] which concerned financial provision in a matrimonial suit, the English High Court held that a *subpoena* which had been issued against the wife's father to obtain evidence from him regarding his assets and testamentary intentions was rightly set aside by the lower court. Although such evidence would have been relevant to the issue of the wife's future financial position, the interest of the father prevailed. Watkins J went as far as to say: "In my opinion the paramount consideration (though I bear in mind the importance of the evidence...) is the right of the individual". In *Senior* v *Holdsworth, Ex parte ITN News Ltd*,[83] Lord Denning, in considering whether ITN should be required to disclose untransmitted film, said: "...the court should exercise this power only when it is likely that the film will have a direct and important place in the determination of the issues before the court.... If the judge considers that the request is...oppressive, he should refuse it".[84]

If such protection is available to a witness at trial, all the more it should be applicable to the respondent to a rule 7A application. It must be re-

[1982] 1 QB 1065; *Lee* v *South West Thames Regional Health Authority* [1985] 1 WLR 845; *Barret* v *Ministry of Defence, supra*, note 53; *Taylor* v *Anderton, Times*, 21 October 1986.

79 The main privileges are legal professional privilege, privilege against self-incrimination, marital privilege, privileges concerning affairs of state and communications to government officers. Business confidences and most personal confidences are not protected.

80 *Ibid.*

81 In the case of discovery against a non-party after the commencement of proceedings, he is regarded as being in the same position as a witness who has been served with a *subpoena duces tecum.* See r 7A(6)(b).

82 [1977] Fam 122.

83 [1976] QB 23.

84 *Ibid*, at 34-35. Also see *Wakefield* v *Outhwaite* [1990] 2 Lloyd's Rep 157; *Parnell* v *Wood* [1892] P 139.

membered that the trial involves a full and final determination of the issues in dispute in a public forum. Compared to an interlocutory application for discovery, a preparatory measure which might be made at any time under the rules, the trial is a final event of the utmost importance imposing certain obligations on witnesses to attend and give evidence. Furthermore, witnesses are called at trial not to give information which may or may not be useful to a particular party, or which may or may not be produced before the court. Rather, they have the paramount duty to the court of giving evidence so that the court can effectively carry out its task of adjudication. As there may be a stronger case for the disclosure of evidence at trial than at the interlocutory stage, it may be contended that the rule 7A respondent is even more deserving of protection against intrusion and oppression.

Therefore, it is suggested that the court should construe rule 8 broadly for the purpose of rule 7A so that the circumstances of the respondent may be taken into account in determining whether discovery should be allowed.[85] This would enable the court to undertake a balancing operation. For example, the court might consider that although discovery of a certain document would have the effect of saving costs (and therefore would be within the scope of rule 8), this interest might be outweighed by the interest of the repondent in protecting certain business, family or other confidences arising out of that document. Such an approach is reflected by the case-law cited above. This concern is more pressing in Singapore than in England where rule 7A discovery is limited to personal injury actions. As the rule applies across the board in Singapore, the applications are likely to be much more frequent here.

Coming now to the procedural safeguards under the rules, a number of provisions operate in favour of the respondent. Thus, the court is empowered to make discovery conditional on the provision of security for costs by the applicant in favour of the person against whom the order is made. The order for discovery may be made on "such other terms, if any, as the court thinks just".[86] The rules also protect the person's position as to costs as he is entitled, subject to the court's discretion to order otherwise, to his costs of the application, "and of complying with any order made thereon on an indemnity basis".[87]

[85] This would be consistent with the court's inherent power to make any order to prevent injustice: O 92, r 4 (RC).

[86] O 24, r 7A(5) (RC).

[87] O 24, r 7A(8) (RC).

IV. INTERROGATORIES

A. *Interrogatories before the Commencement of the Action and against Non-parties*

Order 26A was introduced to enable an applicant to obtain discovery by way of interrogatories in the same circumstances as he may obtain discovery of documents under Order 24, rule 7A. The processes, which were introduced at the same time,[88] complement each other and thereby give effect to the power conferred on the courts by Paragraph 12 of the First Schedule to the SCJA.[89] As in the case of discovery of documents pursuant to rule 7A, an application may be made to administer interrogatories before the commencement of proceedings (by originating summons), or against a non-party after the commencement of proceedings (by summons).[90] Where the application is made before the commencement of proceedings, the supporting affidavit must state "the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings".[91] Additionally, the affidavit must, whether the application is made before or after the commencement of proceedings, "specify the interrogatories to be administered and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the answers to the interrogatories are relevant to an issue arising or likely to arise out of the claim made, or likely to be made, in the proceedings".[92] It is interesting to note that in England there is no provision for interrogatories in this situation. Therefore, the process there for applying against non-parties is limited to discovery of documents.

With regard to the discretion to order discovery of facts pursuant to Order 26A, the principles set out in Order 24, rule 8 (considered above) are re-expressed in Order 26A, rule 2. It provides that the court:

> ...if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order

88 *Ie*, in 1993, by the RSC (Amendment No 2) Rules 1993, *supra*, note 37 and the Subordinate Courts (Amendment No 2) Rules 1993, *supra*, note 37.
89 The paragraph is set out in the text following note 38.
90 O 26A, r 1(1) and (2) (RC).
91 O 26A, r 1(3)(a) (RC).
92 O 26A, r 1(3)(b) (RC).

> if and so far as it is of the opinion that interrogatories are not necessary either for disposing fairly of the cause or matter or for saving costs.

As in the case of rule Order 24, rule 7A, the respondent may challenge the interrogatories on the basis of privilege. The procedural safeguards relating to security for costs and the costs of the application are also applicable to Order 26A. The order to administer interrogatories, like the order for discovery of documents, may be made on "such terms, if any, as the court thinks just".[93] The observations concerning the scope of Order 24, rule 7A (RC), the issue of discretion and the position of the respondent are equally applicable to Order 26A (RC).[94]

B. *Interrogatories Without Leave*

Significant developments have also come about concerning access to the interrogatory procedure.[95] Previously, a party could only administer interrogatories without leave prior to the close of pleadings.[96] This limitation assumed that in the ordinary course of things interrogatories would be administered at an earlier stage of proceedings. As interrogatories are questions seeking information relating to the issues in the case there is no doubt that they can assist in the preparation of pleadings. However, it is a mistake to assume, if this was an assumption under the old rules, that they have a lesser role to play after this phase. Indeed, as litigants are often in a rush to draft pleadings they may need more time to think through the areas of dispute. The pleadings or the discovery process may raise new matters which require specific information; or a party may, for the first time, become aware of other facts which require elucidation. The much simpler and more limited process of further and better particulars, which merely requires elaboration of the pleading, does not always provoke the desired response. Interrogatories are much more incisive as the party administering them can, by framing his questions appropriately, require very specific responses and details. These can extend to any information and therefore the process is a fundamental part of the discovery framework. Furthermore, the process can be used to obtain admissions in respect of certain facts, or at least the position taken

93 See O 26A (RC) generally.

94 See under the previous heading, "Discovery of Documents Before the Commencement of the Action and Against Non-parties".

95 See the RSC (Amendment No 2) Rules (S 278/93), 1992, *supra*, note 37; Subordinate Courts (Amendment No 2) Rules, 1993, *supra*, note 37.

96 Under the former O 26, r 2 (RSC).

by the opponent in respect of those facts. The significance of the procedure seems even more obvious in the absence of oral discovery between the parties.[97] Unfortunately, the interrogatory process has not been utilised as much as it deserves to be. A number of factors have contributed to this situation, one of which is the need for leave after the pleadings stage. The requirement of leave acts as a disincentive because it involves expense and time to prepare the application, and to make the appearance in court.[98] Under the new rules, leave is only required if interrogatories need to be served on more than two occasions. The requirement is no longer dictated by the stage at which the interrogatories are administered. The new rules assume that two occasions are ordinarily sufficient, and therefore leave is required for the third occasion to ensure that the procedure is not abused. A new terminology is used to distinguish between interrogatories without leave and with leave – "interrogatories without order" and "ordered interrogatories".[99]

V. Specific Areas

A. *Personal Injury Actions*

The plaintiff who sues for personal injuries is now required to serve a medical report and a statement of the special damages claimed with his statement of claim.[100] The same requirements apply to a defendant in respect of his counterclaim for personal injuries.[101] The medical report must substantiate all the personal injuries alleged in the statement of claim or counterclaim, evidence of which the plaintiff or defendant respectively proposes to produce at the trial.[102] The statement of special damages is defined as: "a statement giving full particulars of the special damages claimed for expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings, loss of Central Provident Fund contributions and loss of pension rights)".[103] The purpose of this process is to particularise the allegations of injuries and special damage in the pleading so that the defendant is clear

[97] The new discovery provisions in O 24, r 7A and O 26A (RC) only concern documentary discovery (documents and written responses respectively).

[98] The other factors include the effort required in constructing precise questions and the large number of technical rules restricting questions.

[99] See O 26, rr 3 and 4 (RC) respectively.

[100] O 18, r 12(1A) (RC).

[101] O 18, r 18(a) (RC).

[102] O 18, r 12(1C) (RC).

[103] *Ibid*.

about, and in a position to respond to, the plaintiff's claim. It would seem right that the plaintiff ensures that the details contained in the medical report and statement of special damages claimed are kept up to date by supplemental statements or amendments.[104] In certain circumstances a specific procedure may have to be followed, as when the defendants seek documents concerning the medical history of plaintiffs who have brought an action for personal injury arising out of their use of certain drugs.[105]

What are the sanctions if the medical documents are not served with the statement of claim or counterclaim? The court may: "(a) specify the period of the time within which they are to be provided, or (b) make such other order as it thinks fit (including an order dispensing with the requirements of paragraph (1A)[106] or staying the proceedings)."[107] There are no express sanctions concerning non-compliance with the requirements governing the content of these documents. A party who is dissatisfied in this respect would follow the ordinary procedure for obtaining particulars (by letter, and, if this method fails, by application to the court). It is assumed that the court would take a stern view of non-compliance with the specific requirements of the rules.

B. *Medical Examination*

Another important development in respect of personal injury actions is the new power of the court, pursuant to Paragraph 19 of the First Schedule to the SCJA, to order the medical examination of a person "who is a party to any proceedings where the physical or mental condition of the person is relevant to any matter in question in the proceedings".[108] Prior to the introduction of this paragraph in 1993, the position of a personal injury claimant who refused to make himself available for a medical examination was not all that clear. It had been established in England that the courts did have the inherent jurisdiction to stay an action if the plaintiff unreasonably refused to make himself available for a medical examination.[109] The justification for this approach is that the plaintiff's conduct prevents the just determination of the case, and therefore he should not be allowed to proceed

[104] See *Owen* v *Grimsby & Clethorpes Transport*, Times, 14 February 1991.
[105] See *B & Ors* v *John Wyeth & Brother Ltd* [1992] 1 WLR 168 at 173.
[106] That is, the requirement that the documents be served with the statement of claim or counterclaim.
[107] O 18, r 12(1B) (RC).
[108] Introduced by the Supreme Court of Judicature (Amendment) Act, 1993.
[109] *Edmeades* v *Thames Board Mills Ltd* [1969] 2 QB 67.

unless he complies. It could not be said for certain that the Singapore courts would exercise the power of stay in the absence of statutory authority, although it is arguable that the inherent powers of the court to prevent injustice might have been exercised under Order 92, rule 4 (RSC). It is interesting that Paragraph 19 goes beyond the inherent jurisdiction of the English courts (to grant a stay) by empowering the court to actually order a party to undergo a medical examination. Here lies a basic difference in the perceived role of the court. Whereas the English court would never have regarded itself as having the jurisdiction to order a party to be medically examined (because it considered this to be a matter for the decision of the party concerned),[110] the Singapore position is that a more intrusive role by the courts in this area is necessary.

C. *Expert Evidence*

The progress of a case has often been complicated and delayed (if not obstructed) by the absence of a clear and structured procedure for the disclosure of expert evidence and the isolation of issues for trial. It was not uncommon for experts to fail to even agree to the scope of the dispute between them. These problems have been largely alleviated by the introduction of a number of procedures which may operate at the summons for directions stage. For example, the court will consider whether the number of experts is to be limited so that only essential evidence is involved;[111] how the evidence of the experts will be disclosed prior to trial; and whether a "without prejudice" meeting between experts should be held so that the scope of agreement and the issues remaining in dispute can be determined.[112]

D. *Marine Insurance Actions*

The new rule 18 of Order 24 (RC), introduced in 1992,[113] specifically caters to the needs of the insurer in marine insurance actions. It provides that where in an action relating to a marine insurance policy an insurer applies to the court for discovery of documents, the court may order the production of the specified documents "if satisfied that the circumstances of the case are such that it is necessary or expedient to do so".[114] The order may be

[110] See, for instance, *H* v *H* [1966] 3 All ER 560; *W* v *W* [1964] P 67.
[111] In personal injury cases witnesses are specifically limited. See O 25, r 8(1)(c) (RC).
[112] See O 25, r 3(1)(d),(f),(g) (RC).
[113] By the RSC (Amendment) Rules, 1992 (S 515/92). Although this rule formed part of the RSC, 1934, it was omitted from the RSC 1970.
[114] O 24, r 18(1) (RC).

made "on such terms, if any, as to staying proceedings in the action or otherwise, as the court thinks fit".[115] The effect of these provisions is that the court may, as a matter of discretion, make an order for disclosure and stay the proceedings. For example, the court may order the proceedings to be stayed until the order for disclosure has been complied with, and grant the insurer an extended period of time in which to file and serve his defence (that is, after the documents have been disclosed). The order may be addressed to the plaintiff and to any person who is interested in the proceedings and in the matter of the insurance,[116] and may concern all material documents.[117]

E. *Dispute Concerning Jurisdiction*

Specific discovery is now available in relation to an application to challenge the jurisdiction of the court pursuant to Order 24, rule 7 (RC). This provision gives the court a broad discretion to "make such order as it thinks fit" in relation to the application, and to "give such directions for its disposal [*ie*, the disposal of the application] as may be appropriate, including directions for the trial thereof as a preliminary issue". In *Rome & Anor* v *Punjab National Bank*,[118] Hirst J considered the equivalent provision in the English rules, Order 12, rule 8(5) (RC). The defendant bank applied to set aside the writ for irregularity of service on the basis that it had closed its business by the time the plaintiffs had commenced their action. The plaintiffs challenged this contention and applied for discovery of documents showing the continuing operation of the business. The learned judge held that the words "such directions" in rule 8(5) include orders for discovery. He added, however, that "...the court will only exercise its powers under [this subrule] very rarely, and will require the clearest possible demonstration from the party seeking discovery that it is necessary for the fair disposal of the application".[119] Two reasons were given for this approach. First, the court was reluctant to place such a burden on a defendant who disputes the

[115] O 24, r 18(2) (RC). For an illustration of the working of the equivalent English rule, see *Probatina Shipping* v *Sun Insurance* [1974] 1 QB 635.

[116] See *China Transpacific Steamship Co* v *Commercial Union Assurance Co* (1881) 8 QBD 142.

[117] The persons who are ordered to disclose documents must exercise all reasonable endeavours to obtain the documents. See *West of England Bank* v *Canton Insurance Co* (1877) 2 Ex D 472.

[118] [1989] 2 All ER 136.

[119] *Ie*, the conditions in O 24, r 8 (RC) must be satisfied.

jurisdiction of the court. Secondly, as applications to set aside proceedings under Order 12, rule 8 are a common feature of the court process, the delay and expense which would result from frequent orders for discovery would be undesirable. The court held that the plaintiffs had failed to show that the documents sought by them were necessary for the fair disposal of the defendant's application, which was "the cardinal consideration".[120]

VI. Observations

A. *Benefits and Shortcomings*

The shift towards a broader system of discovery before trial has obvious advantages. Parties now know what is likely to transpire at trial. They are in a better position to assess the strengths and weaknesses of their own cases. This may encourage settlement and save the costs of taking the proceedings any further. If the parties are to go to trial they can, by reason of foreknowledge of the evidence to be adduced, more effectively prepare for the occasion. For example, knowing what a witness will say beforehand in his affidavit of the evidence in chief or pursuant to an application under Order 24, rule 7A (RC) or Order 26A (RC) can only enhance the preparation of cross-examination. The presentation at trial is more effective because such a system makes it less likely for the parties to spring surprises on each other. Discovery before the commencement of proceedings may limit the number of suits which are brought because the evidence shows the absence of merits, hence saving costs and reducing the court backlog.

However, the system is not devoid of potential weaknesses. For it to be fair, it is necessary that affidavits be simultaneously exchanged. Although this is the general practice, there may be circumstances in which consequential exchange is unavoidable.[121] There is also the danger that lawyers who prepare the affidavits of the witnesses they intend to call may superimpose their own terminology thereby, whether intentionally or not, changing the effect of the testimony. In *Access to Justice (Final Report)* Lord Woolf expresses concern about the English position: "Witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting."[122] Although cross-examination may be more effective by reason of the disclosure of the

[120] [1989] 2 All ER 136 at 142.

[121] See *Mercer* v *Chief Constable of Lancashire, supra*, note 25, at 376; *Kirkup* v *British Rail Engineering Ltd* [1983] 1 WLR 1165.

[122] *Access to Justice (Final Report)*, July, 1996, at 129, para 54.

witness's evidence before trial, it also provides the opportunity for an opposing witness to avoid being surprised, and therefore exposed, in the course of cross-examination. Furthermore, the effect of this new emphasis on discovery before trial, and the availability of various discovery procedures now available, may lengthen the pre-trial process and add to the costs of litigation.

B. *Shift in Prioritisation*

For almost a century the discovery process in Singapore was contained by the very priorities which had dictated the English system. The rule that information could not be obtained from a person who would be required to give evidence at trial was premised on the basis that such information would eventually become available. Furthermore, the concern of the parties before 1851 was to obtain information from each other (rather than non-parties) because parties were not allowed to testify until that year. Correspondingly little emphasis was given to discovery from a non-party who would eventually testify, a trend which appears to have persisted even after parties and non-parties were put on equal terms. The principle that a witness who was not a party should only give evidence at the trial was also based on the strictly held view that as he did not have a direct interest in the case he should not be inconvenienced before the trial. There was also the fear that a party who knew his opponent's evidence in advance of the trial might concoct evidence in response or be tempted to suborn the witness.[123]

As is evident from the developments considered in this article, very different priorities govern the modern discovery process in Singapore. The non-party's involvement in pre-trial proceedings (and any consequential inconvenience on his part) is now justified in the public interest in ensuring expedition of the case, settlement or reduction in issues (and, therefore, costs).[124] It would also seem that the fear that broader discovery may lead to fabrication of evidence is not as compelling as the advantages gained by the parties in the preparation of their cases.[125] The role of discovery in encouraging settlement marks a further step in promoting pre-trial resolution of disputes[126] and, therefore, has the effect of lessening the former emphasis

[123] For an account of these factors, see the author's earlier article, "The Early Development of the Discovery Process", *supra*, note 4.

[124] However, the non-party continues to have the protection afforded by legal privilege. He is normally compensated in costs (O 24, r 7A(8) and O 26A, r 5).

[125] Moreover, the fear is to a large extent unjustified if all the witnesses' affidavits have to be disclosed at the same time, as is the general rule. See the cases cited, *supra*, note 121.

[126] Other procedures include pre-trial conferences and court dispute resolution.

on the trial as the ultimate process for dispute resolution. The fear that pre-trial disclosure of evidence would supplant the trial process is now countered by the argument that new measures merely give the parties an opportunity to decide whether, with foreknowledge of the evidence to be presented, they want to take the suit further. If so, they are better equipped for the conduct of the trial. The concern that additional discovery processes at the interlocutory stage would result in higher costs is acceptable because even higher costs would be incurred at the later stages of the action, an outcome which may be avoided if the new processes promote settlement. More fundamentally, the introduction of the process of adducing affidavits of the evidence in chief constitutes a shift from the situation in which the orality principle and the trial as the usual forum for dispute resolution had been paramount.

C. *Singapore's Position in Relation to Other Common Law Legal Systems*

An interesting feature of many of the changes is that they go beyond the English reform of the discovery process. For example, rule 7A is not limited to personal injury actions as is its English counterpart. Indeed, the suggestion has been made in England that the rule be extended beyond personal injury actions to all cases.[127] Order 26A (which applies the process of interrogatories in the same circumstances as documentary discovery under rule 7A) has no equivalent in England. The procedure can be particularly useful when specific questions need to be asked concerning the facts before the commencement of the action. The jurisdiction to order a stay of proceedings if a party refuses to undergo a medical examination has now been converted into an express power to order a medical examination. Whereas the English process of disclosing statements of the evidence of witnesses has become mandatory in recent times,[128] the corresponding process of pre-trial disclosure of affidavits of the evidence in chief was obligatory in Singapore from the time of its inception in 1991.[129] The result of all these developments is that whereas the scope of discovery in 1990 was very much narrower than the discovery process in England at that time, the current position is that Singapore's discovery process is more extensive.

A comparison between the discovery processes in Singapore and much

[127] *Access to Justice (Final Report), supra*, note 122, at 127-128, paras 48-52.
[128] Practice Direction (Civil Litigation: Case Management), *supra*, note 13.
[129] By reason of the RSC (Amendment No 2) Rules 1991 (S 281/91).
[130] Where the Federal Rules of Civil Procedure ("Fed R Civ P") apply.

of the United States[130] reveals that while the current priorities of civil litigation are geared to broad discovery, some limits must be imposed in the interest of control. One of the most common forms of discovery in the United States[131] is the oral deposition, a process which involves witnesses[132] being questioned on oath before trial. The record of the examination[133] is made available at trial. This system enables the parties to thoroughly interrogate opposing witnesses to obtain the necessary information and to gauge the strength of the opponent's case. As the process is similar to examination at trial, lawyers gain foreknowledge of the testimony likely to be given subsequently. The closest which Singapore comes to pre-trial interrogation of a party in relation to his case is the interrogatory procedure which involves a party administering written questions to the other party which the latter must respond to, also in written form.[134] It is the absence of spontaneity involved in the direct interrogation of witnesses which primarily differentiates the interrogatory procedure and the oral deposition.

However, a process akin to the oral deposition would not fit well into Singapore's discovery framework. While in the United States, the oral deposition is the primary means of enabling a party to find out what relevant evidence is available for the purpose of the trial, in Singapore, this objective is achieved by mandatory mutual discovery after the close of pleadings pursuant to Order 24, rule 2 (RC), the provision of affidavits of the evidence in chief (in which the witness's oral evidence is disclosed well before trial) as directed on the summons for directions pursuant to Order 25 (RC), and ancillary discovery devices.[135] Moreover, the recent developments in Singapore discussed in this article have made it necessary for the parties to incur additional interlocutory costs. The oral deposition, often criticised in the United States because of the considerable expense and time which it often involves, would import these problems without conferring any real benefit. As the affidavit of the evidence in chief records the testimony of the witness, the trial lawyer in Singapore is in essentially the same position

[131] Under the Federal Rules. See Fed R Civ P 30.

[132] The parties are subject to this process as well. Even counsel have deposed pursuant to Fed R Civ P 30(a), which provides that the deposition of "any person" may be taken.

[133] *Ie*, the deposition.

[134] See O 26 (RC), which is considered in the author's earlier article, "The Early Development of the Discovery Process", *supra*, note 4. Also see "Interrogatories Before the Commencement of the Action and Against Non-parties" and "Interrogatories Without Leave", *supra*, text at notes 88-99.

[135] See, *eg*, O 24, rr 3, 7, 7A and O 26A (RC), which have been considered in the course of this article and the author's previous article, "The Early Development of the Discovery Process", *supra*, note 4.

as his US counterpart *vis-à-vis* the oral deposition. Indeed, whereas the American lawyer would go though the process of examining his witness in chief despite the availability of the latter's deposition, this duplication is avoided in Singapore by requiring the witness's affidavit to stand as his evidence in chief.[136]

VII. Conclusion

The transformation of discovery procedure from a virtually clandestine process (which perpetuated the "trial by ambush") to a much more open system involving greater co-operation between the parties, reflects a fundamental shift in approach towards litigation. The former practice accentuated the adversarial nature of proceedings on the assumption that "trial by ambush" was in the best interests of justice. The reformed rules operate on a quite different footing. They assume that the parties are in the best position to resolve their dispute if they know exactly what they are up against, namely the evidence against them. As the conclusion of a trial is more easily foreseeable by reason of broad pre-trial discovery the parties are placed in a more favourable position to resolve their dispute without proceeding to trial. In fact, contrary to the traditional process of discovery, the trial is regarded by the new rules as a dispute solving mechanism of last resort. Should the suit go to trial the new procedures help by enabling the parties to focus on the issues in dispute and to prepare for the evidence to be raised.

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[136] See O 38, r 2 (RC). Although the court may permit a witness to give evidence in the appropriate circumstances.

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